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February 3, 2009

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: October 28, 2008

Case Number: TSO-0684

This Decision concerns the eligibility of xxxxxxxxxxxxxxxx (hereinafter referred to as "the individual") to hold an access authorization 1/ under the Department of Energy's (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled, "General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As discussed below, after carefully considering the record before me in light of the relevant regulations, I have determined that the individual's access authorization should not be granted.

I. Background

The individual is employed at a Department of Energy (DOE) facility where his work requires him to have an access authorization. During a background investigation, the local DOE security office discovered some derogatory information that created a security concern. DOE asked the individual to participate in a Personnel Security Interview (PSI) in order to resolve the information. The PSI did not resolve the security concerns.

On September 17, 2008, the local DOE security office (LSO) sent a letter (Notification Letter) advising the individual that it possessed reliable information that created a substantial doubt regarding his eligibility to hold an access authorization. In an attachment to the Notification Letter, the LSO explained that the derogatory information fell within the purview of two potentially disqualifying criteria set forth in the security regulations at 10 C.F.R. § 710.8, subsections (f) and (l) (hereinafter referred to as Criteria F and L, respectively). 2/

1/ Access authorization is defined as an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material. 10 C.F.R. § 710.5(a). Such authorization will be referred to variously in this Decision as access authorization or security clearance.

2/ Criterion F concerns information that the individual has "misrepresented, falsified, or omitted significant information from a Personnel Security Questionnaire or a Questionnaire for Sensitive Positions, Personnel Qualifications Statement, a Personnel Security Interview, written or oral statements made in response to an official inquiry on a matter that is relevant to a determination regarding eligibility for DOE access authorization. . . ." 10 C.F.R. § 710.8(f). Criterion L
(continued...)

Upon receipt of the Notification Letter, the individual filed a request for a hearing. The LSO transmitted the individual's hearing request to the Office of Hearings and Appeals (OHA), and the OHA Director appointed me as the Hearing Officer in this case. At the hearing that I convened, the individual presented his own testimony. He brought forth no other witnesses. The DOE counsel did not present any witnesses. The DOE submitted a number of written exhibits prior to the hearing.

II. Regulatory Standard

A. Individual's Burden

A DOE administrative review proceeding under Part 710 is not a criminal matter, where the government has the burden of proving the defendant guilty beyond a reasonable doubt. Rather, the standard in this proceeding places the burden on the individual because it is designed to protect national security interests. This is not an easy burden for the individual to sustain. The regulatory standard implies that there is a presumption against granting or restoring a security clearance. *See Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for granting security clearances indicates "that security determinations should err, if they must, on the side of denial"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

The individual must come forward at the hearing with evidence to convince the DOE that granting his access authorization "will not endanger the common defense and security and will be clearly consistent with the national interest." 10 C.F.R. § 710.27(d). The individual is afforded a full opportunity to present evidence supporting his eligibility for an access authorization. The Part 710 regulations are drafted so as to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay evidence may be admitted. 10 C.F.R. § 710.26(h). Hence, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

B. Basis for the Hearing Officer's Decision

In personnel security cases arising under Part 710, it is my role as the Hearing Officer to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all the relevant evidence, favorable and unfavorable, as to whether the granting or continuation of a person's access authorization will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.7(a). I am instructed by the regulations to resolve any doubt as to a person's access authorization in favor of the national security. *Id.*

2/ (...continued)

relates, in relevant part, to information that a person has "[e]ngaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security" 10 C.F.R. § 710.8(l).

III. The Notification Letter and the Security Concerns at Issue

As stated above, the LSO cites two potentially disqualifying criteria as bases for denying the individual's security clearance, Criteria F and L. To support its reliance on Criterion F, the LSO states that the individual provided vague, inconsistent and deceptive answers during a Personnel Security Interview (PSI) in October 2007 regarding his illegal drug use and two arrests. The LSO also alleges that the individual deliberately omitted significant information from a 2007 Questionnaire for National Security Positions (QNSP) about his past arrests.

From a security standpoint, false statements made by an individual in the course of an official inquiry regarding a determination of eligibility for DOE access authorization raise serious issues of honesty, reliability, and trustworthiness. The DOE security program is based on trust, and when a security clearance holder breaches that trust, it is difficult to determine to what extent the individual can be trusted again in the future. *See* Guideline E of the *Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* issued on December 29, 2005 by the Assistant to the President for National Security Affairs, The White House.

As for Criterion L, the LSO alleges that during an October 2007 PSI, the individual indicated that no one, including his fiancée, knew about his arrests. The individual's vulnerability to blackmail, exploitation, and duress calls into question the individual's judgment, reliability, trustworthiness and his ability to protect classified information. *See id.* at Guideline E.

IV. Findings of Fact

In May 2007, the individual submitted a QNSP in connection with an investigation of his eligibility to hold a security clearance. On the QNSP, the individual was asked, *inter alia*, the following: "Have you ever been charged with or convicted of any offense (s) related to alcohol or drugs?" The individual checked "yes" to this question and indicated that he had been arrested in October 1994 for Driving Under the Influence (DUI). During a PSI with the individual in October 2007, the individual stated that he could not remember any details of that arrest. He further stated that he might have been cited for Driving on a Suspended License, but had trouble remembering details of the incident, dates or how he could have lost his license. The LSO subsequently conducted a background investigation of the individual which revealed that the individual was arrested and charged with Driving on a Suspended License in 1990 and 1991 (on both occasions, the individual paid fines and court costs). In addition, when questioned during the October 2007 PSI, the individual stated that he might have been cited for Possession of Cocaine. Again, his background investigation revealed a 1989 arrest for Possession of Cocaine and Paraphernalia. None of these arrests were listed on the individual's QNSP. During the course of the individual's PSI, the individual stated that no one knew about his DUI or cocaine arrests.

V. Hearing Officer Evaluation of the Evidence

The key issue under Criterion F is whether the individual has brought forward sufficient evidence to demonstrate that he can now be trusted to be consistently honest and truthful with the DOE. In

considering this question, I found that the nature of the individual's omissions was serious. The individual's lack of candor concerning his arrests could increase his vulnerability to coercion or blackmail and raises important security concerns. The DOE must rely on individuals who are granted access authorization to be honest and truthful. This important principle underlies the criterion set forth in 10 C.F.R. § 710.8(f).

During the hearing, the individual was questioned about his omissions and misrepresentations on his 2007 QNSP. The individual stated that, when asked about his alcohol or drug related offenses, he listed a 1994 DUI. During the hearing, the individual recalled that he had gone to court and that his license was suspended for one year. Transcript of Hearing (Tr.) at 9. However, when questioned about his inconsistent answers given during his October 2007 PSI, the individual testified that he had trouble remembering whether he was arrested and charged with Driving on a Suspended License, in both 1990 and 1991. *Id.* at 11. He further testified that he did not list these two arrests on his QNSP because he simply did not remember they occurred. With respect to the individual's 1989 Possession of Cocaine charge, the individual testified that he was unsure of details and dates regarding his past arrests and he was told to state "unknown" on the QNSP if he could not recall specific incidents. *Id.* at 13. According to the individual, he has not used cocaine since 1994 or 1995. *Id.* He further testified that he did not deliberately misrepresent or omit information from his QNSP or during his PSI. *Id.* at 18. He testified that the charges and arrests were over thirteen years old and stated that he "just got mixed up" and "might have been a little nervous" when questioned about his arrests. The individual reiterated during the hearing that he still can not remember details of the arrests and could not explain why he had trouble remembering his past arrests other than the fact that he was trying to forget about his past and focus on his future. *Id.* at 19 and 28. He testified that he is an honest and reliable person who takes care of his family. *Id.* at 27. The individual added that he does not currently drink or take drugs. *Id.* Finally, the individual testified that he could not be blackmailed or coerced in any way as his family and acquaintances all know about his past arrests now. *Id.* at 16.

After considering all the evidence before me, I find that the individual has failed to mitigate the security concerns arising from the omissions on his QNSP and his inconsistent explanations given during his PSI. Although the individual testified that he did not intentionally or deliberately falsify his QNSP or provide inconsistent explanations during his PSI, I find his explanations for these omissions and inconsistencies to be unpersuasive. The individual could offer no more than a vague explanation for his omissions and inconsistencies during the hearing, simply stating that he could not recall the specifics about past arrests because they were over thirteen years old and he wanted to forget about his past. I do not find this explanation to be credible because an arrest is an unusual event that I believe most people would remember. It was my observation during the hearing that the individual was ill-prepared and did not take the proceeding seriously. I found this nonchalant attitude troubling. The individual is a mature adult who was certainly aware of the consequences of misrepresenting information to the DOE. His uncorroborated testimony that he is an honest and reliable person is not sufficient to mitigate the security concerns at issue. Despite several suggestions by both the DOE Counsel and myself, the individual did not provide character witnesses to testify about his judgment, honesty and reliability. Notably, the individual did not even offer the

testimony of his fiancée. For the foregoing reasons, I find the individual has failed to mitigate the security concerns raised by Criterion F.

With respect to Criterion L, the individual attempted to mitigate this concern by stating that his family and acquaintances now know about his past arrests and therefore he is not vulnerable to blackmail, exploitation and duress. Had the individual provided corroboration for this statement through witness testimony, he might have allayed the security concerns under Criterion L. Absent corroboration, I cannot find mitigation here.

VI. Conclusion

In the above analysis, I have found that there was sufficient derogatory information in the possession of the DOE that raises serious security concerns under Criteria F and L. After considering all the relevant information, favorable and unfavorable, in a comprehensive common-sense manner, including weighing all the testimony and other evidence presented at the hearing, I find that the individual has not brought forth convincing evidence to mitigate the security concerns associated with Criteria F and L. I am therefore unable to find that granting the individual's access authorization would not endanger the common defense and security and would be consistent with the national interest. Accordingly, I find that the individual's access authorization should not be granted at this time. The individual may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Kimberly Jenkins-Chapman
Hearing Officer
Office of Hearings and Appeals

Date: February 3, 2009